

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

JUL 31 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

DAVID ARMANDO GOMEZ,

Appellant.

2 CA-CR 2006-0351  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053543

Honorable Michael J. Cruikshank, Judge

AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED WITH DIRECTIONS

Terry Goddard, Arizona Attorney General  
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Tucson  
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant David Gomez was convicted after a jury trial of one count each of third-degree burglary, theft of means of transportation, fleeing from a law enforcement vehicle, and criminal damage, all relating to the theft of a Dodge Ram pickup truck. The trial court sentenced Gomez to concurrent prison terms, the longest of which was 3.5 years. Gomez argues the trial court erred in sentencing him for a felony on the criminal damage conviction after designating it a misdemeanor and in denying his motion for a judgment of acquittal. We agree that the court erred when it sentenced Gomez for felony criminal damage but affirm his convictions on all other counts.

### FACTS

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On August 18, 2005, the victim reported to police that his red Dodge Ram truck had been stolen from a mall parking lot. Two days later, Officers Boaz and Grayson spotted a red Dodge Ram truck. The truck had no license plate and its temporary plate was obstructed from view by the truck's tinted windows. When Grayson activated the emergency lights to stop the truck, Gomez, its driver, accelerated and attempted to evade them.

¶3 After crashing the truck into a fence, Gomez emerged from the vehicle, tore his shirt on a barbed-wire fence, then entered a Nissan Sentra, also with a temporary plate. The Sentra was driven to Sasabe, where Gomez and the driver abandoned it. The officers eventually apprehended Gomez after the driver of the Sentra surrendered to other officers. Officer Boaz identified Gomez as the person who had emerged from the Dodge Ram, ripped

his shirt on the barbed-wire fence as he ran off, and fled in the Nissan Sentra. After police recovered the truck, the owner of the Dodge Ram identified the truck as his, albeit with significant damage. That damage included a ruined door lock and ignition switch.

### **CRIMINAL DAMAGE CONVICTION**

¶4 At the conclusion of the state's case, Gomez moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., on all counts. He specifically contended the state had failed to present any evidence that the vehicle was damaged in an amount exceeding \$250, an element of felony criminal damage. *See* A.R.S. § 13-1602(B)(3). In response, and with the apparent approval of both counsel, the court stated its intention to submit the criminal damage count to the jury only as a misdemeanor. In its response to Gomez's written Rule 20 motion following trial, the state conceded it had presented no evidence on the amount of damage and agreed the criminal damage conviction was a misdemeanor. Apparently overlooking its previous ruling, the trial court at sentencing classified the criminal damage conviction as a class six felony and imposed a one-year term of imprisonment.

¶5 The state contends on appeal that the issue is moot because Gomez seeks only a new sentence, and he has already served the erroneously lengthy term. An issue "becomes moot for purposes of appeal where as a result of a change of circumstances before the appellate decision, action by the reviewing court would have no effect on the parties." *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). But Gomez seeks relief that would tangibly benefit him. Although the state is correct that Gomez indeed

seeks a new sentence, in part, to reduce his incarceration time—relief that would have no ultimate effect on either party—Gomez also asks this court to remand the case for resentencing so the offense may be correctly designated as a misdemeanor.<sup>1</sup> Because a felony conviction carries potential consequences unrelated to incarceration, we cannot agree with the state that any action by this court would have no effect on Gomez.

¶6 First and foremost, additional felonies on a defendant’s criminal record can affect punishment for future offenses. Under Arizona law, once the state has proved that a defendant has committed a new felony offense after having been previously convicted of a felony, the defendant becomes a repetitive offender subject to an enhanced prison term. *See* A.R.S. § 13-604. The mandatory sentencing ranges triggered by that enhancement increase with the proof of additional felony convictions. *Id.* Moreover, the commission of a felony within ten years before committing a new offense is a statutory aggravating factor a trial court must consider in determining whether to increase a sentence above the presumptive term. A.R.S. § 13-702(C)(11).<sup>2</sup>

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<sup>1</sup>In his opening brief, Gomez argues that he “should not have received a sentence in excess of four months for the Class 2 misdemeanor *and should not have been sentenced to a felony for a charge that had been designated a misdemeanor by the Court.*” (Emphasis added.)

<sup>2</sup>The impact of the erroneous felony designation under Arizona law would be mitigated by Gomez’s conviction of three other felonies on the same date, convictions we are affirming. *See* A.R.S. § 13-604(M) (multiple convictions for offenses committed on one occasion count as only one conviction for purposes of enhancement); *see also* A.R.S. § 13-702(C)(11) (having prior felony conviction constitutes aggravating circumstance). Nonetheless, we cannot foresee the future status of Gomez’s other convictions, predict how a future sentencing court might differently consider a criminal record of four prior felony convictions rather than three, *see* A.R.S. § 13-702(C)(24) (allowing trial court to consider

¶7 The extent of a defendant’s prior felony record also presents additional challenges in the guilt phase of a trial. A defendant’s credibility as a witness in his or her own defense may be challenged on that basis. *See* Ariz. R. Evid. 609(a), 17A A.R.S.; *see also State v. Harding*, 141 Ariz. 492, 498-99, 687 P.2d 1247, 1253-54 (1984) (impeaching defendant with multiple prior felony convictions not improper). Further, felony convictions create potential barriers to employment, particularly in those fields subject to state regulation. *See, e.g.*, A.R.S. § 15-534(C) (authorizing state board of education to reject application for teaching certificate on finding that applicant “engaged in conduct that is immoral or unprofessional or engaged in conduct that would warrant disciplinary action if the person had been certified at the time the alleged conduct occurred”); A.R.S. § 32-572(A)(2) and (B) (authorizing state cosmetology board to refuse to issue a license to applicant if he or she has been convicted of a crime “substantially related to the qualifications, functions or duties of the license for which application is made”); A.R.S. §§ 32-721(A)(3)(c), 32-741(A)(1) (authorizing board of accountancy to refuse certification of applicant who has been convicted of a felony and whose civil rights have not been restored); A.R.S. §§ 32-1122(D), 32-1154(A)(8) (felony conviction constitutes ground for finding of “lack of good character” necessary to obtain or renew contractor’s license); A.R.S. § 32-1645 (requiring nursing

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in aggravation “[a]ny other factor that the state alleges is relevant to the defendant’s character or background”), or predict how any other state or federal jurisdiction might differently treat Gomez based on the additional conviction. The possibility that Gomez might receive harsher treatment in the future based on the erroneous felony designation is enough to prevent us from characterizing the error as moot.

assistant applicant to submit a verified statement itemizing all prior felony convictions and date of absolute discharge therefrom).

¶8 In sum, a felony conviction creates a legal status with adverse consequences to a defendant. We therefore decline to characterize an erroneous felony designation as moot merely because the defendant has already served his punishment for the felony. The cases the state cites for the contrary proposition are readily distinguishable. In *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985), Division One of this court found numerous challenges to the “manner in which [the defendant’s] sentence was imposed” were moot because the defendant had served his entire term. But, in so doing, the court emphasized that it so ruled precisely because those challenges were not to the nature of the conviction itself. *Id.* In *State v. Rodriguez*, 200 Ariz. 105, ¶¶ 1, 7, 23 P.3d 100, 100, 101-02 (App. 2001), we similarly found moot a defendant’s challenge to an already-served sentence because the defendant had not challenged the underlying conviction. Here, by contrast, Gomez squarely challenges a core component of his underlying conviction—its felony or misdemeanor designation.

¶9 Having rejected the state’s assertion that Gomez’s claim is moot, we need not belabor whether the trial court erred. As noted, the state implicitly concedes Gomez was properly convicted only of a misdemeanor on the criminal damage count, and the trial court’s own previous ruling likewise supports that conclusion.<sup>3</sup> Further, in the absence of any

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<sup>3</sup>The record suggests the trial court’s classification of the offense as a felony at sentencing was inadvertent.

testimony on the dollar value of the damage to the truck, the evidence supports only a conviction of criminal damage as a class two misdemeanor. *See* § 13-1602(B) (requiring state to prove damage more than \$250 to constitute a felony; criminal damage of less than \$250 is class two misdemeanor). We therefore modify the conviction to a class two misdemeanor for criminal damage and remand the case for resentencing for the limited purpose of correcting the sentence. *See State v. Rushing*, 156 Ariz. 1, 5, 749 P.2d 910, 914 (1988); *see also* Ariz. R. Crim. P. 31.17(d), 17 A.R.S.

### **RULE 20 MOTION**

¶10 Gomez argues that because the state did not present evidence that the Dodge Ram in his possession at the time of the police chase was the same Dodge Ram reported stolen a few days earlier, the trial court erred in denying his Rule 20 motion on the three charges related to that vehicle, burglary in the third degree, theft, and criminal damage.<sup>4</sup> In reviewing the denial of a motion for judgment of acquittal under Rule 20, Ariz. R. Crim. P., we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). “Substantial evidence . . . is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). The substantial

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<sup>4</sup>Gomez does not contend that his conviction for fleeing from a law enforcement vehicle depended in any respect on this alleged gap in the evidence.

evidence required for a conviction may be either direct or circumstantial. *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991); *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981).

¶11 Gomez contends the state presented insufficient testimony connecting the recovered truck to its owner and therefore failed to present evidence that Gomez had committed burglary. Gomez correctly observes that the state presented no evidence about the vehicle’s identification number or license plate number to prove it was the same truck stolen from the parking lot of the shopping mall two days earlier. But Gomez cites no authority for the proposition that the state is confined to such evidence in proving the identity of a vehicle. And the victim testified the truck the police recovered was his own. That, coupled with the victim’s testimony that his truck had been stolen from the shopping mall on August 18, two days before the police officers testified the chase occurred, was substantial evidence from which the jury could conclude the recovered truck and the stolen truck were the same vehicle.

¶12 Next, Gomez argues the state presented no evidence that he “entered or remained in the red truck unlawfully nor that he intended to commit theft or any other felony while in the truck,” therefore entitling him to a judgment of acquittal on the burglary count. Although Gomez acknowledges that burglary can be committed by “[e]ntering or remaining unlawfully” in a car with “the intent to commit any theft,” *see* A.R.S. § 13-1506(A), he emphasizes he told law enforcement officers he did not know the truck was stolen—a statement the state presented to the jury.



¶13 But, in light of the evidence that the ignition switch was damaged, a fact readily apparent to any driver; that Gomez fled from police officers when they attempted to stop the vehicle; and Gomez’s own acknowledgment that the circumstances under which he had acquired the truck were suspicious,<sup>5</sup> the jury could reasonably reject Gomez’s claim of ignorance that the truck was stolen. Together those facts constituted substantial evidence that Gomez knew the truck was stolen and he was either an accomplice to the unlawful entry into the vehicle<sup>6</sup> or he remained unlawfully in the truck while intending to permanently deprive the victim of it. Under either theory, the jury could find Gomez guilty of burglary in the third degree. *See State v. Brown*, 188 Ariz. 358, 360, 936 P.2d 181, 183 (App. 1997) (person can commit burglary by entering or remaining in vehicle with intent to commit theft of vehicle itself). The trial court did not abuse its discretion in denying Gomez’s Rule 20 motion.

¶14 We affirm Gomez’s convictions on all counts as modified, but remand the case for resentencing on the criminal damage count.

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PETER J. ECKERSTROM, Presiding Judge

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<sup>5</sup>Gomez explained to a police officer that he had accepted \$1,000 from a person named “Diane” to drive a truck with no keys to Mexico.

<sup>6</sup>The trial court instructed the jury on accomplice liability.

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge